State Office of Administrative Hearings

Cathleen Parsley
Chief Administrative Law Judge

April 28, 2011

Les Trobman, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: SOAH Docket No. 582-11-0249; TCEQ Docket No. 2009-1515-AIR-E; In Re: Executive Director of the Texas Commission on Environmental Quality v. Albemarle Corporation

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than May 18, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than May 31, 2011.

This matter has been designated **TCEQ Docket No. 2009-1515-AIR-E; SOAH Docket No. 582-11-0249**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at http://www10.tceq.state.tx.us/epic/efilings/ or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

Steven D. Arnold
Administrative Law Judge

SDA/Ls
Enclosures
cc: Mailing List

STATE OFFICE OF ADMINISTRATIVE HEARINGS

AUSTIN OFFICE
300 West 15th Street Suite 502
Austin, Texas 78701
Phone: (512) 475-4993
Fax: (512) 322-2061

SERVICE LIST

AGENCY: **Environmental Quality, Texas Commission on (TCEQ)**

STYLE/CASE: **ALBEMARLE CORP**

SOAH DOCKET NUMBER: **582-11-0249**

REFERRING AGENCY CASE: **2009-1515-AIR-E**

STATE OFFICE OF ADMINISTRATIVE HEARINGS	**ADMINISTRATIVE LAW JUDGE** **ALJ STEVEN ARNOLD**
REPRESENTATIVE / ADDRESS	**PARTIES**
BLAS J. COY, JR. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY OFFICE OF PUBLIC INTEREST COUNSEL P.O. BOX 13087, MC-103 AUSTIN, TX 78711-3087 (512) 239-6363 (PH) (512) 239-6377 (FAX) bcoy@tceq.state.tx.us	PUBLIC INTEREST COUNSEL
LAURENCIA N FASOYIRO STAFF ATTORNEY TEXAS COMMISSION ON ENVIRONMENTAL QUALITY LITIGATION DIVISION 5425 POLK AVENUE, SUITE H HOUSTON, TX 77023-1486 (713) 422-8914 (PH) (713) 422-8910 (FAX) laurencia.fasoyiro@tceq.state.tx.us	TCEQ EXECUTIVE DIRECTOR
CHARLES NESTRUD CHISENHALL, NESTRUD & JULIAN, P.A. 400 WEST CAPITOL, STE 2840 LITTLE ROCK, AR 72201 (501) 372-5800 (PH) (501) 372-4941 (FAX)	ALBEMARLE CORPORATION

SOAH DOCKET NO. 582-11-0249
TCEQ DOCKET NO. 2009-1515-AIR-E

EXECUTIVE DIRECTOR OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, **Petitioner**	§	**BEFORE THE STATE OFFICE**
v.	§	**OF**
ALBEMARLE CORPORATION, **Respondent**	§	**ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION

I. INTRODUCTION

The Executive Director (ED) of the Texas Commission on Environmental Quality (TCEQ or Commission) alleges that Albemarle Corporation (Respondent) violated the Texas Health and Safety Code and Commission Rules based on a 2009 investigation at Respondent's chemical manufacturing plant located at 2500 North South Street, Pasadena, Harris County, Texas (Plant). TCEQ alleges that Respondent failed to maintain the minimum net heating value on Flare G-D-1 and failed to maintain the correct list of equipment components that were excluded from the Leak Detection and Repair (LDAR) monitoring program.

Respondent filed a motion for summary disposition, claiming that it had a settlement agreement with the ED and that the ED's attempt to take this matter to hearing for a larger penalty violates the settlement agreement. The ED filed a response to Respondent's motion, claiming that the settlement agreement expressly was conditioned on the Commission's approval; thus there is no violation of the agreement by the ED's attempt to increase the penalty. The ALJ finds that there was a binding settlement between the ED and Respondent and that Respondent is entitled to have the Proposed Agreed Order submitted to the Commission for its consideration.

II. JURISDICTION AND NOTICE

Order No. 1, issued on October 8, 2011, found jurisdiction existed and proper notice was provided, and the Proposed Order contains the necessary findings of fact and conclusions of law to establish jurisdiction without further discussion here.

III. STANDARD OF REVIEW

A motion for summary disposition may be granted if the moving party shows that it is entitled to relief as a matter of law. The rule of the Commission found at 30 TEX. ADMIN. CODE § 80.137 sets forth criteria for determining when summary disposition is appropriate. This rule provides, in pertinent part, that:

> Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records if any, on file in the case at the time of hearing, or filed thereafter and before disposition with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.[1]

In addition to the criteria explicitly stated in Rule 80.137, Texas case law clarifies that summary judgment may be appropriately granted when there is no genuine issue as to any material fact.[2] In *Wilkinson*, the court further elaborated that, in granting a motion for summary judgment, "reasonable minds could not differ in arriving at the ultimate conclusion or conclusions to be drawn from the undisputed facts disclosed by the record. . . ."[3] Further, the court must resolve "all doubts as to the existence of a genuine issue as to a material fact" against the party moving for summary judgment. In addition, the court gives the party opposing the

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[1] 30 TEX. ADMIN. CODE § 80.137(c).

[2] *Harper v. Fikes*, 336 S.W.2d 631, 636 (Tex. Civ. App.--Austin 1960, writ ref'd n.r.e.); *Smith v. Ellis*, 319 S.W.2d 745, 749 (Tex. Civ. App.--Waco 1958, no writ); *Wilkinson v. Stafford*, 298 S.W.2d 867, 869, (Tex. Civ. App.--Waco), *rev'd on other grounds*, 304 S.W.2d 364 (Tex. 1957); *Toliver v. Bergmann*, 297 S.W.2d 208, 210 (Tex. Civ. App.--San Antonio 1956, no writ).

[3] 298 S.W.2d at 869.

motion "the benefit of every reasonable inference which properly may be drawn in favor of his position."[4]

IV. DISCUSSION

A. Undisputed Facts

The facts in this case are not in dispute. On November 13, 2009, David Van Soest, the Manager of the Commission's Enforcement Division, sent Respondent a Notice of Enforcement Action related to the Plant. The Notice contained the following settlement offer:

> Please find enclosed a a proposed agreed order which we have prepared in an attempt to expedite this enforcement action. The order assesses an administrative penalty of One Thousand Eight Hundred Twenty-Three Dollars ($1,823). We are proposing a one time offer to defer Three Hundred Sixty-Four Dollars ($364) of the administrative penalty if you satisfactorily comply with all the ordering provisions within the time frames listed. Therefore, the administrative penalty to be paid is One Thousand Four Hundred Fifty-Nine Dollars ($1,459). The order also identifies the violations that we are addressing and identifies specific technical requirements necessary to resolve them. . . .
>
> If we reach agreement in a timely manner, the TCEQ will then proceed with the remaining procedural steps to settle this matter . . . .
>
> If you agree with the order as proposed, please sign and return the original order and the penalty payment . . . .
>
> If the signed order and penalty are not mailed and postmarked within 60 days from the date of this letter, your case will be forwarded to the Litigation Division and this settlement offer, including penalty deferral, will no longer be available.

On January 8, 2010, Respondent accepted the offer of settlement by executing the Proposed Agreed Order and remitting it, together with a check in the amount of $1,459, to TCEQ. The Commission cashed Respondent's check on January 14, 2010. Respondent also installed a calorimeter called for in the technical requirement section of the Proposed Agreed Order at a cost of $238,000.

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[4] *Smith*, 319 S.W.2d at 749. *See also State v. Durham*, 860 S.W.2d 63 (Tex. 1993).

On March 12, 2010, another member of the Enforcement Division, Naida Hameed, sent the following email to Respondent announcing that the ED had reconsidered its decision to enter into a settlement:

> I am attaching a copy of the revised penalty calculation worksheet as well as the original one that was sent to you in November, 2009. My upper management has determined that violation #1 needs to be changed from potential minor to potential moderate. Also, the violation events have to be changed from 1 single event to 7 quarterly events (based on violation days = 563). The payable penalty amount has now increased from $1,459 to $23,635 (an additional $22,176). . . . The case is coming close to agenda so the most we can give you [is] a couple of weeks to settle.

Respondent responded to the March 12, 2010, email by notifying Ms. Hameed that it expected the ED to honor the parties' settlement agreement by sending the proposed order to the Commission for its consideration as promised.

On June 21, 2010, the ED filed the instant EDPRP, which Respondent claims violates the parties' settlement agreement.

B. Respondent's Position

Respondent contends that the ED made an unconditional offer to settle and to present that agreement to the Commission for its consideration, and that Respondent complied with all requirements of the offer in a timely manner. In short, Respondent contends that it had a deal with the ED.

Respondent argues that compromise and settlement agreements are subject to general principles of the law of contracts.[5] According to Respondent, a settlement agreement constitutes an enforceable contract if there is: (1) an offer to compromise; (2) a meeting of the minds; and (3) an unconditional acceptance within the time and on the terms offered.[6] Finally, according to

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[5] *Stewart v. Mathes,* 528 S.W.2d 116, 119 (Tex. Civ. App. 1975).

[6] 12 TEX. JUR. 3d *Compromise and Settlement* § 5 (*citing McLean v. Randell,* 135 S.W. 1116 (Tex. Civ. App. 1911); *Applewhite v. Sessions,* 114 S.W.2d 289 (Tex. Civ. App. – Beaumont 1938); *Montanaro v. Montanaro,* 946 S.W 2d 428 (Tex. Civ. App. – Corpus Christi 1997).

Respondent, once entered into, a settlement agreement cannot be repudiated by either party and will be summarily enforced.[7]

Respondent further argues that principles of estoppel prevent a government agency from reneging on a settlement agreement once the opposing party has taken action in reliance on the settlement agreement.[8] Respondent cites *Petkovsek v. Board of Pardons and Paroles*[9] as support for the proposition that public policy favors the enforcement of settlement agreements voluntarily entered into by a state agency and that allowing governmental agencies to unilaterally walk away from their settlement agreements would put a party such as Respondent in the position where they "could never rely on the word' of their government opponents and would remove the incentive for a party to settle a case involving the government.[10]

Respondent contends that all the elements of an enforceable contract are present in this case. The Notice sent by the ED[11] contained a "one-time offer" to compromise and settle this matter. Respondent states that it unconditionally accepted this offer by sending a check and executing the Proposed Agreed Order within the 60-day deadline imposed by the Notice. Respondent also installed a calorimeter at a cost of $238,000. A meeting of the minds was reached, according to Respondent, as evidenced by the clear language of the Notice and the Proposed Agreed Order. According to Respondent, this incontrovertible evidence that a settlement contract had been reached, and principles of estoppel prevent the ED from now unilaterally attempting to cancel that contract.

Respondent contends that the Texas Administrative Code does not permit the ED to make settlement offers, collect cash for settlement amounts, and then unilaterally cancel the settlement agreement. The Texas Administrative Code, according to Respondent, outlines an orderly

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[7] Cia Anon Venezolana de Navegacion v. Harris, 374 F.2d 33, 35 (5th Cir. 1967).

[8] Southwestern Bell Telephone Co. v. NLRB, 667 F.2d 470, 476 (5th Cir. 1982).

[9] 785 F. Supp. 82 (E.D. Tex. 1992).

[10] *Id.* at 85,

[11] Under the Texas Administrative Code, Executive Director (or ED) is defined as "[t]he executive director of the commission, or any authorized individual designated to act for the executive director." 30 TEX. ADMIN. CODE § 3.2(16).

process to be followed in the settlement of enforcement actions. First, the ED and the respondent must reach a settlement agreement by agreeing to a proposed order.[12] When the ED and the respondent reach an agreement on an agreed order, "the executive director *shall* publish notice of the proposed agreed order in the *Texas Register,* providing 30 days for public comment."[13] Once the notice of proposed agreed order is published, "the executive director *shall* file the agreed order with the chief clerk," who then submits it to the Commission for approval.[14]

Respondent contends that the ED agreed that if Respondent would pay an administrative penalty of $1,459, install a calorimeter, and execute the Proposed Agreed Order, "the TCEQ will then proceed with the remaining procedural steps to settle this matter. . . ." Respondent contends that it performed its part of this bargain and that the ED is bound by principles of contract law and estoppel to perform its part of the bargain.

C. ED's Position

The ED's principal argument is that: (1) there was no meeting of the minds; (2) there was no consent by each party to the terms of the transaction; and (3) there was no execution and delivery of the contract with the intent that it be mutual and binding. Therefore, the ED argues, there was no contract between the ED and Respondent.

With respect to the first element, the ED contends that "[c]learly, there was no meeting of the minds if Respondent disregarded a critical condition of the settlement, which is that Commission approval is required." With respect to the third element, the ED states that there was no intent that the agreement be binding before it was approved by the Commission. In short, the ED's arguments all center around the fact that the Commission did not approve the Proposed Agreed Order, and that such approval was required.

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[12] 30 TEX. ADMIN. CODE § 70.10(a).

[13] 30 TEX. ADMIN. CODE § 70.10(c) (*emphasis added*).

[14] Id.

D. ALJ's Analysis

The ALJ has reviewed the arguments of both sides, and finds that there was a binding contract between the ED and Respondent. The ED made an offer to Respondent, and Respondent complied with all aspects of the offer in a timely manner. That is the essence of a legally enforceable contract. If the ALJ were to adopt the ED's position in this matter, there could be a chilling effect on parties agreeing to settle matters – they simply would have no assurance that their "agreement" with the ED would be honored and presented to the Commission for consideration. The ED entered into a legally enforceable agreement to submit the Proposed Agreed Order to the Commission for its consideration. The fact that "upper management" subsequently decided that the penalty should have been calculated in a different manner is irrelevant; the calculation of the penalty should have been vetted at the higher levels *before* the offer was made to Respondent, not after.

The ALJ wants to ensure that the impact of his ruling is clear. Respondent and the ED had a legally binding agreement. With Respondent having performed all duties imposed by the agreement, there was one duty left to be performed – that being that the ED would submit the Proposed Agreed Order to the Commission for consideration. That would constitute fulfillment of the terms of the agreement by both sides. The Commission would then be free to give due consideration to all sides of the issue.

ISSUED April 28, 2011.

Steven D. Arnold

STEVEN D. ARNOLD
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

AN ORDER
REGARDING ENFORCEMENT ACTION AGAINST
ALBEMARLE COPRORATION.;
TCEQ DOCKET NO. 2009-1515-AIR-E
SOAH DOCKET NO. 582-11-0249

On _____, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Proposal for Decision (PFD) regarding Albemarle Corporation (Respondent), which was presented by Steven D. Arnold, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH), who issued the PFD on April 28, 2011.

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. Albemarle Corporation (Respondent) owns a chemical manufacturing plant located at 2500 North South Street, Pasadena, Harris County, Texas (Plant), which is adjacent to a bayou.

2. During an investigation from July 30, 2009, to August 7, 2009, a TCEQ Houston Regional Office investigator conducted an investigation at the Plant. The investigator documented violations of 30 TEX. ADMIN. CODE §§ 116.115(c) and 122.143(4), 40 C.F.R. § 60.18(c)(3)(ii), Air Permit No. 69A, Special Condition (SC) No. 4A, Air

Permit No. 3962, SC No. 3, Air Permit No. 18114, SC No. 2, Federal Operating Permit (FOP) No. 02285, Special Terms and Condition (STC) Nos. 1A and 8, and TEX. HEALTH & SAFETY CODE § 382.085(b) for failing to maintain the minimum net heating value of 300 British Thermal Units per standard cubic feet per minute (BTU/scfm) on Flare G-D-1; and documented violations of 30 TEX. ADMIN. CODE §§ 116.115(c) and 122.143(4), Air Permit No. 18114, SC No. 10A, FOP No. 02285, STC No. 8, and TEX. HEALTH & SAFETY CODE § 382.085(b) for failing to maintain the correct list of equipment components that were excluded from the Leak Detection and Repair (LDAR) monitoring program.

3. On November 13, 2009, David Van Soest, the Manager of the Commission's Enforcement Division, sent Respondent a Notice of Enforcement Action related to the Plant. The Notice contained an unconditional, one-time offer to settle the enforcement action against Respondent in exchange for Respondent signing the Proposed Agreed Order attached to the Notice within 60 days, sending a check in the amount of $1,459 to the Commission within 60 days, and complying with all ordering provisions of the Proposed Agreed Order within the time frames listed.

4. On January 8, 2010, Respondent accepted the offer of settlement by executing the Proposed Agreed Order and remitting it, together with a check in the amount of $1,459, to TCEQ. The Commission cashed Respondent's check on January 14, 2010. Respondent also installed a calorimeter called for in the technical requirement section of the Proposed Agreed Order at a cost of $238,000.

5. On March 12, 2010, another member of the Enforcement Division, Naida Hameed, sent the an email to Respondent announcing that upper management had reconsidered settlement and had decided to increase the proposed penalty to $23,635.

6. Respondent responded to the March 12, 2010, email by notifying Ms. Hameed that it expected the ED to honor the parties' settlement agreement by sending the proposed order to the Commission for its consideration as promised.

7. On June 21, 2010, the ED filed the Executive Director's Preliminary Report and Petition (EDPRP), which Respondent claims violates the parties settlement agreement.

8. Respondent filed a motion for summary disposition on February 8, 2011, and the ED filed a response in opposition on February 23, 2011. The SOAH Administrative Law Judge issued his Proposal for Decision granting Respondent's motion for summary disposition on April 28, 2011.

II. CONCLUSIONS OF LAW

1. Under TEX. WATER CODE ANN. § 7.051, the Commission may assess an administrative penalty against any person who violates a provision of the Water Code or of the Health & Safety Code within the Commission's jurisdiction or of any rule, order, or permit adopted or issued thereunder.

2. Under TEX. WATER CODE ANN. § 7.052, a penalty may not exceed $10,000 per violation, per day for each violation at issue in this case.

3. Additionally, the Commission may order the violator to take corrective action. TEX. WATER CODE ANN. § 7.073.

4. As required by TEX. WATER CODE ANN. § 7.055 and 30 TEX. ADMIN. CODE §§1.11 and 70.104, Respondent was notified of the EDPRP and of the opportunity to request a hearing on the alleged violation or the penalty or corrective action proposed therein.

5. As required by TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; 1 TEX. ADMIN. CODE § 155.401, and 30 TEX. ADMIN. CODE §§ 1.11, 1.12, 39.25, 70.104, and 80.6(b)(3), Respondent was notified of the hearing on the alleged violation and the proposed penalty and corrective action.

6. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.

7. Under 30 TEX. ADMIN. CODE §§ 70.10, when the ED and the respondent reach an agreement on an agreed order, "the executive director *shall* publish notice of the proposed agreed order in the *Texas Register,* providing 30 days for public comment." Under that same provision, once the notice of proposed agreed order is published, "the executive director *shall* file the agreed order with the chief clerk," who then submits it to the Commission for approval.

8. Based on the above Findings of Fact and Conclusions of Law, the ED and Respondent entered into a legally enforceable contract pursuant to which the ED was required to submit a Proposed Agreed Order in the form signed by Respondent to the Commission for its consideration.

III. ORDERING PROVISIONS

NOW, THEREFORE, BE IT ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:

1. The Executive Director of the Texas Commission on Environmental Quality (Commission) shall submit to the Commission the Proposed Agreed Order for consideration by the Commission.

2. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.

3. The effective date of this Order is the date the Order is final, as provided by 30 TEX. ADMIN. CODE § 80.273 and TEX. GOV'T CODE ANN. § 2001.144.

4. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.

5. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

ISSUED:

TEXAS COMMISSION ON ENVIRONMENTALQUALITY

_____

Bryan W. Shaw, Ph.D., Chairman
For the Commission